IN THE HIGH COURT OF SINDH, CIRCUIT COURT, LARKANA

Civil Revision Appl.No.S-25 of 2011

Applicants:

1) Abdul Jabbar
2) Ali Hassan,
3) Mushtaq alias Gagoo,
4) Mitho alias Muhammad Mithal alias Abdul,
5) Mst. Mumtaz,
6) Mst. Fahmeeda

ALL sons & daughters of Muhammad Hashim by caste Narejo, resident of village Bux Lakhair Taluka Mehar district Dadu.

7) Mst. Aisha,
8) Mst. Safia,
9) Mst. Zakia,

ALL daughters of Molvi Anwar by caste Mallah Resident of village Bux Lakhair Taluka Mehar district Dadu.

The applicants No.2 to 9 through their Attorney applicant No.1 Abdul Jabbar THROUGH Syed Zamir Ali Shah Advocate.

Respondents:

1) Ghulam Mustafa s/o Muhammad Ismail Narejo resident of village Bux Lakhair Taluka Mehar at present Sonara Muhallah Dadu

2) The Tapedar Deh Peroz Shah,
3) Mukhtiarkar Land Revenue Mehar,
4) The D.D.O Revenue Mehar,
5) The E.D.O Revenue Mehar,
6) The Province of Sindh through DCO Dadu
7) Mst. Noor-Jahan d/o Muhammad Hashim Narejo Resident of village Bux Lakhair, Taluka Mehar district Dadu

Respondent No.1 in person.
Official respondents through Mr. Abid Hussain Qadri, State Counsel.

Date of hearing: 27.04.2018.

Date of decision: .06.2018.

O R D E R.

AMJAD ALI SAHITO, J.- The instant revision application is directed against the judgment dated 12.01.2011 and decree dated 13.01.2011 respectively passed by learned 1st

Additional District Judge, Dadu, in Civil Appeal No.92 of 2010, whereby he set aside the judgment and decree dated 14.06.2010 and 21.6.2010 passed by learned Senior Civil Judge, Mehar in FC Suit No.122 of 2008 re- Ghulam Mustafa v. Abdul Jabbar and others and decreed the suit of plaintiff/respondent No.1. Against the impugned judgment of appellate Court, the applicants have preferred instant revision application.

2. The facts, in brief, necessary for disposal of instant revision application are that the S.No.376 admeasuring (2-09) acres situated in deh Peroz Shah was originally ancestral property of Muhammad Ismail Narejo who sold out (0-32) ghuntas from said survey number to one Muhammad Dawood Soomro through registered sale deed in the year 1989. It is stated that Muhammad Ismail expired and left behind him four sons namely Ghulam Mustafa (respondent No.1/plaintiff), Muhammad Bakhsh who died unmarried, Muhammad Qasim who also expired leaving three sons, but unfortunately they also expired leaving behind four sons as their legal heirs, while Muhammad Hashim, who was father of applicants No.1 to 5/defendants No.1 to 7 and maternal grandfather of applicants No.7 to 9/defendants No.8 to 10, who had also one daughter namely Mst. Amnat, she expired leaving

behind one daughter Mst. Nasiba. It is further stated that Muhammad Hashim had also another daughter namely Mst. Zeenat, she also expired leaving behind three daughters namely Mst. Aisha, Mst. Safia and Mst. Zakia. Late Muhammad Hashim used to look after the land and give zamindari share to respondent No.1 /plaintiff and after his death, his son Abdul Jabbar (applicant No.1/defendant No.1) continued such practice, but later on he refused to give zamindari share to respondent No.1/plaintiff, therefore, respondent No.1/plaintiff filed a Civil Suit No.12/2008 (Re- Ghulam Mustafa v/s Abdul Jabbar and others) for declaration, possession and permanent injunction in the Court of learned IInd: Civil Judge, Mehar, but applicant No.1 Abdul Jabbar stated in his written statement that the entire area of S.No.376 was purchased by Muhammad Hashim and Mst. Amnat in the sum of Rs.4000/- from Muhammad Ismail through registered sale deed dated 25.10.1981. Thereafter respondent No.1 /plaintiff had withdrawn his suit with permission to file fresh and the same was withdrawn. Later on, respondent No.1/plaintiff filed present suit for declaration, possession, cancellation of sale deed dated 25.10.1981 with entry there to and consequential relief of permanent injunction.

3. Upon service of notice, the applicant No.1/defendant No.1 filed written statement stating therein that Muhammad Ismail sold out 0-67 paisas share to Muhammad Hashim (father of applicants) and 0-33 paisa share to Mst. Amnat through registered sale deed dated 25.10.1981 and such entry No.21 was maintained in the record of rights; that Mst. Amnat expired leaving only one daughter Mst. Nasiban, who was married with late Muhammad Umar Narejo, thus, Muhammad Dawood Soomro has no right or title over the suit land, but fact is that Muhammad Hashim (father of applicant No.1) and Mst. Amnat were law full owner of the land. He has further stated that respondent No.1 /plaintiff has shown Mst. Amnat as a daughter of late Muhammad Ismail, she expired leaving one daughter Mst. Nasiban, but the plaintiff/respondent No.1 did not make her as party, thus the suit is bad for non-joinder of necessary party; that Muhammad Hashim neither used to give zamindari share to plaintiff/respondent No.1 during his life time nor after his death defendant No.1/applicant No.1 used to give zamindari share to him; that plaintiff/respondent No.1 withdrew his previous suit for want of having no documentary proof, hence this suit is not maintainable according to law and plaintiff/respondent No.1 has not

come with clean hands, as he has no cause of action to file the present suit, but this suit has been filed with malafide intention. He prayed for dismissal of the same with costs.

4. Learned counsel for remaining defendants(applicants in this revision application)adopted the same written statement on their behalf as already filed by the defendant No.1(applicant No.1) vide statement dated 21.3.2009.

5. The official respondents No.2 to 6/defendants No.11 to 16 in the suit were served and on their behalf learned D.D.A filed statement stating therein that since the matter pertaining to the private respondents, therefore, official defendants have no interest in the suit and they do not want to file their written statement, hence the suit was ordered exparte against official respondents vide order dated 16.10.2009.

6. From pleading of parties, the learned trial court framed following issues:-

1) Whether registered sale deed dated 25.10.1981 and entry there to is illegal, null, void and is liable to be canelled?

2) Whether the defendants No.1 to 10 refused to give zamindari shares to the extent of appellants' share regarding suit land malafidely?

3) Whether the suit land was originally the property of Muhammad Ismail Narejo, who sold the suit land to Muhammad Hashim

Narjeo (father of defendants No.1 to 7) and maternal grandfather of respondents No.8 to 10 and Mst. Amnat through registered sale deed dated 25.10.1981?

4) Whether entry bearing No.110 in revenue record in favour of Muhammad Dawood is false, fabricated and illegal one?

5) Whether the suit of the plaintiff is non joinder of necessary party?

6) Whether suit of the appellant is badly under valued?

7) Whether the plaintiff is entitled for the relief claimed for?

8) What should the decree be?

7. Thereafter the parties led their evidence before the trial Court, who after hearing all the parties dismissed the suit of the plaintiff/respondent No.1 and he filed an appeal against the judgment and decree passed by learned trial Court, the appellate Court reversed the findings of trial Court decreed the suit of the plaintiff/respondent No.1.

8. It is contended by the learned counsel for the applicants that the judgment and decree of appellate Court is patently illegal and without lawful authority being result of mis-reading and non-reading and improper appreciation of material placed on record resulting into miscarriage of justice; that learned appellate Court has not considered that illegality, voidness and fraud in connection with registered sale deed dated 25.10.1981

was not initially proved by respondent No.1 and could not cast aspersion on the genuineness of registered document; that learned appellate Court has not applied the judicial mind while deciding the appeal and conflicted the judgment and decree of trial Court and its approach to the facts and law appears to be misconceived resulting into impugned judgment and decree, which is perverse and fanciful and do not deserve to be sustained; that judgment and decree of appellant Court has been passed in contravention of law, hence same is illegal, void and ultra-vires; that admittedly the applicants are in possession of the suit land by virtue of registered sale deed dated 25.10.1981 , which was executed in favour of their father and respondent No.1 denied the title and ownership of father of applicants, but learned appellate Court incorrectly hold that the burden lies upon applicants to prove registered sale deed and ownership of their father; that learned appellate Court has not considered that necessary and important parties are not joined in the suit, whereas, impugned judgment affects the rights of the parties, who are not before the Court; that impugned judgment does not discuss the important questions and controversy involved in the suit; that learned appellate Court has not considered that executants of registered

sale deed did not raise objection in his life time and respondent No.1 kept silent for about 30 years, hence his suit was time barred and not maintainable; that sale deed dated 25.10.1981 is registered document and the learned appellate Court erred in holding that said document was not proved in view of provision of Qanun-e-Shahadat Ordinance, 1979 because the said ordinance is not applicable to the document registered in the year 1981; that the respondent No.1 being plaintiff neither proved his claim nor brought any evidence by examining other witness, therefore, his only examination is not sufficient to prove his case. He lastly concluded that judgment and decree passed by learned trial Court is legal and proper, hence the same is not suffer from any illegality or material irregularity, as such, it may be maintained and the impugned judgment of learned appellate Court may be set aside.

9. On the other hand, respondent No.1 is present in person and submitted that impugned judgment passed by learned appellate Court is legal and proper as the same has rightly been delivered in accordance with law, therefore, he supported the impugned judgment.

10. Learned State counsel submitted that there is dispute between the private parties, therefore, State has nothing to do.

11. I have heard the learned counsel for the applicants, respondent No.1 in person as well as learned State counsel and have gone through material available on record.

12. There could be no denial to legal position that appellate Court can competently reverse the findings of the trial Court but such reversal must always be backed with better legal reasoning. A legally decided issue by trial court normally needs not be disturbed unless and until same is found to have been against material or settled legal principles. In the instant matter, the learned appellate Court reversed the findings of the trial court on answers to three main **points for determination** out of five, which are as follows:-

i. Whether Muhammad Ismail Narejo sold out entire Survey No.376 (2-9) acres to his son and daughter Muhammad Hashim (father of respondent No.1 to 7/defendant No.1 to 7) to the extent of 0-67 and 0-33 paisa share respectively through registered sale deed dated: 25-10-1981.

ii. The F.C Suit No.122/2008 is bad for non-joinder of necessary parties?

iii. Whether appellant/plaintiff is co-sharer in the property left by Muhammad Ismail?

iv. Whether the suit is undervalued?

v. What should the decree be?

13. On point No.1, learned appellate Court stated that Ghulam Mustafa respondent No.1/plaintiff deposed that his father has never sold out Survey No.376 (2-09) acres to Muhammad Hashim and Mst: Amnat, but he sold out (0-32) Ghuntas to Muhammad Daud Soomro, hence after denial by the respondent No.1/plaintiff in respect of validity of sale deed, the burden shifted to the respondent No.1 to prove the execution of sale deed dated 25-10-1981 because he is beneficiary.

14. On careful consideration of above observation, it is obvious that the appellate Court while passing the impugned judgment erred to accept mere statement of Ghulam Mustafa (respondent No.1/plaintiff) that his father did not sell out to his another son and daughter however competence of deceased father was never a question of dispute because the respondent No.1/plaintiff himself admitted sale by his father to one Muhammad Daud Soomro. There can be no denial to legal position that a sale can competently be made in favour of anybody including blood-relations, so is clear from the

provision of Section 54 of the Transfer of Property Act, 1872. I would add that the registration endorsement prima facie is a proof of execution of document by the executant and compliance of all necessary formalities by the Registering Officer, therefore, a presumption of correctness is attached with the document. Since, it was the respondent No.1 / plaintiff who challenged the document, executed by his father, hence initial burden was upon him to prove the document to be fraudulent or otherwise illegal. For this, it was obligatory upon the respondent No.1 / plaintiff to have establish :

i) document was presented by an unauthorized person;

ii) the registration was done in absence of its executant or his authorized representative;

iii) there has been denial of the execution of the document by executant ;or

iv) the language, used in the execution of document, was not understandable by the parties or description of the property has been incorrectly given in the document;

In absence of above, the correctness, attached to a registered document, would not shake on mere assertion of any one, including blood-relation of executant even if there had been some procedural error / defect. Reference

is made to the case of **Haji Hashmat Ali v. Manzoor Ahmed 2004 SCMR 1545** wherein it is held as:

> **"The general rule is that the procedural defects in the registration of a document will neither reflect upon its execution nor invalidate the registration but if the defect is of substantial nature, such as presentation of document by an unauthorized person, the registration of a document in absence of its executant or his authorized representative, the denial of the execution of the document by executant or the language used in the execution of document is not understandable by the parties or description of the property has been incorrectly given in the document, ... Undoubtedly, the registration endorsement prima facie is a proof of execution of document by the executant and compliance of all necessary formalities by the Registering Officer, therefore, a presumption of correctness is attached with the document. The non compliance of the requirement of sections 34 and 35 of Registration Act is only of procedural in nature, the error will not affect the registration of document and if the defect is of substantial nature which is not curable, the registration shall become invalid.".**

Since, law itself gives presumption of correctness to a **registered document** then in the event of a challenge by one, **not the executant,** the initial burden would be upon the person challenging the legality of the document.

It is a matter of record that challenge to registered document was not by the executant though he remained alive for considerable period. Admittedly, the possession of

the subject matter was / is with the applicants. Thus, to discharge initial burden the respondent no.1 / plaintiff was required to have brought a little more than his own assertions.

The respondent no.1 / plaintiff though had claimed to have been receiving his share but examined none in support of such claim. He event not bothered to get the said Muhammad Daud Soomro examined to support his claim of sale by his father in favour of said Muhammad Daud Soomro nor he himself filed any suit against the respondent, challenging the registered sale deed dated 25-10-1981. Furthermore, learned appellate Court if observed that beneficiary was to prove document then Mst: Amnat was also co-sharer and beneficiary, however, she was not made party in the suit and how she can prove the document, challenged in her absence ?, hence such reasons of appellate Court are beyond the application of judicial mind, therefore, suit is hit by principle of **Audi Alterum partum.** As regard the findings, given by learned appellate Court that sale deed does not show number or identification of old age executants who was illiterate and 85 years old, it would suffice to say that normally the appearance of the executants with proof of their identity i.e **'NIC'** is sufficient to satisfy their identity to **Sub-**

Registrar. Further, it has been a matter of record that registration endorsement was there hence correctness, attached to the **registered document** would not disappear even on any procedural error, so was held in the case of Haji Hashmat Ali supra. In my view that such findings are based on conjecture and sheer imagination because sub-registrar registered the instrument after codal formalities and it is settled law that sanctity attached with registered instrument hence strong evidence is required to cause aspersion on the genuineness of such document, but no such evidence is available on record to create doubt. It is noticed that learned appellate Court also disregarded that original vendor did not challenge the sale deed dated 25-10-1981, who expired in year 1994 and such facts are stated by the applicant No.1 in his cross- examination. Likewise, the vender lived 13 years after execution of sale deed, but he neither objected on it, nor filed any suit against such sale deed, even otherwise respondent No.1/plaintiff also remained silent for a considerable time, therefore, in this respect, the findings given in the impugned Judgment are beyond the lawful justification. The observation of appellate Court while passing the impugned judgment stated that sale deed has been witnessed by two attesting witnesses, however, none

of them was examined in proof of execution of sale deed by virtue of Article 79 of Qanoon-e-Shahadat Order and so also no author of sale deed was examined. Such findings of learned Judge are not only against the general presumption of correctness attached to a **registered document** but also against the scope of the sub-proviso of **Article 79 of Qanoon-e-Shahadat Order, 1984** which reads as under:-

> **"provided that it shall not be necessary to call an attesting witness in proof of execution of any document, not be a will, which has been registered in accordance with provision of registration act 1908, (XVI of 1908) unless its execution by the person by whom it purports to have been executed is specially denied"**

According to above sub-proviso there is no need to call / examine an attesting witness in proof of a **document**, registered in accordance with provision of **Registration Act, 1908** particularly where challenge to a document is not by the **executant** himself. In the present case executants/vendor has not denied the registered sale deed dated 25-10-1981, therefore, the applicants were not obliged to prove the document unless and until initial burden was / is discharged by the challenger. In this respect, I am fortified with the judgment of Honourable Supreme court of Pakistan reported in the case of

MANZOOR AHMED and others v. MEHRBAN and others (**2002 SCMR 1391),** wherein it has been observed as follows:-

> **"Art. 17(2)---Registered sale deed---Execution, proof of---Non-examination of attesting witnesses---Effect---Where sale-deed was registered document and purchaser was in possession of disputed land on the basis thereof then non examination of its attesting witnesses would not be fatal"**

15. In view of above, I am of the considered view that the appellate Court has completely failed to appreciate the provision of law as well as the case law of Hon`ble apex Court, therefore, such findings of the learned appellate Court legally cannot sustain.

16. As far as observations of learned appellate Court with regard to the initiation of compromise talks with the applicant supported the case of respondent No.1/plaintiff are concerned, it is suffice to say that applicant No.1 stated in his cross examination that they tried to compromise with the plaintiff, but did not succeed as plaintiff demanded share of Muhammad Bux and Muhammad Qasim. I would not hesitate for a single moment that initiation of compromise or arrival of compromise even would never be a proof sufficient proof to determine an independent issue. The compromise shall

always remain confined to what the parties to a compromise agreed. Thus, I would say that the findings of appellate court towards legality of a **registered document** on mere oral version of initiation of compromise talks were / are not worth sustaining. Further, no evidence with regard to terms or root of such compromise talks was brought on record by the respondent no.1 / plaintiff by way of examining those, remained involved in such compromise talks. Therefore, such findings has no force in the eye of law.

As far as observations of learned appellate Court that applicant No.1/defendant No.1 is in possession of the suit land, but possession without title does not authorize the possessor to continue his possession. I would take no exception to legal position that a mere possession without title and lawful authority would not be a proof of ownership/lawful title however, what seems to have been lost sight of learned appellate Court is that the possession of defendant No.1(applicant No.1) is by virtue of registered sale deed, executed on 25-10-1981 in favour of his father and his another aunt Mst: Amnat, as such, he cannot be said to be illegal occupant of the suit property unless the document is adjudged otherwise. In this regard, the Article 126 of Qanun-i-Shahadat Order 1984 provides as under:-

> **"Burden of proof as ownership. When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner".**

17. As far as the suit is bad for mis-joinder and non-joinder of the party, the learned appellate Court observed that by virtue of Order 1 rule 9 CPC shall be defeated by the mis-joinder and non-joinder of the parties, hence suit is not bad in the eye of law for non-joining Mst: Amnat in the instant Suit. Such view of the learned appellate court also appears to be in negation to legally established principle of law that "**decree, passed in absence of necessary party, could not be sustained".** The learned appellate Court entirely failed in appreciating the difference between **necessary party** and **proper party.** The necessary party is one whose interests are directly or indirectly are likely to be effected in consequence of a decision while the proper party is not necessarily one to be effected but may include those who may have been involved in facts, pleaded in plaint. It is well established law that when the necessary party is not impleaded in the suit, the suit is bad in the eyes of law as it has already been decided same point in the case of MUHAMMAD

AYUB v. LAHORE DEVELOPMENT AUTHORITY & others reported in (**2000 MLD-1809**), which reads as follows:-

> **"Order 1 rule 10---'Necessary party' and 'proper party'---distinction---Person against who no relief is asked for is not a necessary party but may be a proper party---Failure to implead necessary or proper party---Effect---Where a necessary party is not impleaded the suit is bad while a suit in which a proper party is not impleaded, is not bad."**

18. In the case of LAHORE CANTT. COOPERATIVE HOUSING SOCIETY LTD v. MUHAMMAD ANWAR & others reported in (**2007 CLC 160**), which reads follows:-

> **"O. 1 rule 10---specific Relief Act (1 of 1877) S.42---Necessary party---Necessary party ought to have been impleaded as in its absence no effective decree could be passed---court could direct plaintiff to have joined necessary party in the suit---suit for declaration regarding land---non impleading of transferee of suit land---Effect---all necessary party to the suit should be joined, and in case they are omitted the suit is bad for non-joinder of necessary party and no effective decree in such circumstances can be passed---Record show that suit land has been transferred to various persons by transferee even before the institution of suit---Court, therefore, while exercising its duty under previsions of O. 1 R.10 CPC should have directed plaintiff to have joined said transferee as a party, notwithstanding, any objection was raised by defendant or not particularly when defendant had informed the Court that a part of suit property had been transferred to various allottees of transferee who would be mainly be affected on account of decree passed in favour of plaintiff---decree passed in absence of necessary party could not be sustained---case remanded for decision a fresh. (Underlined by me).**

19. It is noticed that neither Mst: Naseeba the daughter of transferee Mst: Amnat being co-sharer in the registered sale deed dated 25-10-1981 was joined though she otherwise was a necessary party as a decree (decision) was likely to affect her rights and interests, hence such findings of appellate court are against the law so cannot sustain.

20. On point No.3, learned appellate Court observed that respondent No.1/ plaintiff will be co-sharer in the property left by Muhammad Ismail, however, the appellate Court has not determined that what property and to what extent Muhammad Ismail left the property whether appellate Court proved that Muhammad Ismail sold out 0-33 Ghuntas to Muhammad Daud Soomro or not ?, whereas, there is no evidence brought on record from the side of Muhammad Dawood Soomro, therefore, such findings are vague in nature and same is not sustainable in law.

21. It is worthwhile to mention here that respondent No.1/plaintiff stated in his deposition that registered sale deed is fraudulent document. The plaintiff/respondent No.1 has not been able to establish fraud and misrepresentation particularly in view of the fact that the sale deed was a registered document. In this regard, I am

fortified with the judgment of Hon`ble apex Court reported in the case of SARDARA v. MUHAMMAD (**1994 SCMR 2299)**, which reads as under:-

> **"S.39----------suit for cancellation of sale deed--- plaintiff failed to establish on record fraud and misrepresentation particularly in view of the fact that sale deed was registered document--- overwhelming evidence produced by defendants ruled out possibility of fraud or misrepresentation---sale deed was registered on 12-11-1960, while suit was filed on 21-11-1966, i.e. six years later--- plaintiffs had tried to explain that they were in possession of land but that fact by itself was not sufficient proof of the allegations made by them---"**

22. In view of above, the appellate Court has also failed to consider the well-settled law that registered document has sanctity attached it and strong evidence is required to create doubt on its genuineness, however, the appellate Court mainly based his judgment on surmises and conjectures. In this context the reliance placed in the case of RASOOL BUKHSH & others v. MUHAMMAD RAMZAN reported in (**2007 SCMR- 85)** wherein the Hon'able Supreme Court of Pakistan has held that :-

> **" It is a settled law that the registered document has sanctity attached to it and stronger evidence is required to cast a aspersion on its genuineness as law laid down by this court in Mirza Muhammad Sharif's case NLR 1993 Civil 148".**

23. The plaintiff/respondent No.1 could not prove his case in the light of cogent evidence and law, however, the appellate Court set-aside the judgment of lower Court which too without lawful reasoning rather based his findings on the imaginations, therefore, his findings are not sustainable in law. Furthermore, the registered sale deed pertains to year 1981 and defendants/applicants were in possession since their father, but respondent No.1/ plaintiff challenged such registered documents after about 28 years on its registration and such long period of his silence is non-explanatory in the evidence of respondent No.1/plaintiff, even the plaintiff was well aware and his father too, however, the original executants of the document did not challenge such document in his life time as well as respondent No.1/plaintiff did not take any efforts to sue the remedy before any forum, therefore, in my humble view that his sole version without supporting/documentary evidence documentary as well as oral, which can be safely said that registered instrument was a notice to general public, as such, the suit of respondent No.1/plaintiff is barred by law.

24. In view of above detailed discussion, I am of the humble view that the learned counsel for the applicants have been able to point out above material discrepancies

and irregularities committed by the learned appellate Court while passing the impugned judgment, as he has travelled beyond the law, therefore, his findings are not sustainable under the law for the reason that the same are capricious in manner, erratic, void and abinitio. Consequently, instant revision application is allowed and impugned judgment dated 12.01.2011 and decree dated 13.01.2011 passed by learned appellate Court are set aside and judgment and decree passed by lower Court i.e. Senior Civil Judge, Mehar are maintained/restored.

JUDGE.